hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

In the instant case, the learned judge made no order as to the service of the amended notice, nor was there any order that service thereof be dispensed with. The order for substitution was made on the 20th August, 1971. So the appeal as against the substituted respondents could only have been lodged, at the very earliest, on the day when they were substituted, that is, some months after the expiry of the period of limitation.

It is true that there was no appeal against the order, but that does not deprive the respondents of their vested right to plead that the appeal was barred by limitation. (*Colgate-Palmolive (Asia) Ltd.* v. *Swedish East Asia Co. Ltd.*[1] *ibid*).

For these reasons, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Ee, Lim, Tai & Leong; Chan & Co.*

RE JOSEPH DE CRUZ JAMES & ANOR.; MARGARET ROSE v. MANOMANI KANDIAH

[O.C.J. (Abdul Hamid J.) August 20, 1973]

[Kuala Lumpur — Originating Summons No. 369 of 1972]

Land Laws — Deed of trust of land for child — Land transferred to former wife "as trustee" — Entry in memorandum of transfer — Whether may be construed as declaration of trust — Whether transfer valid — National Land Code, ss. 301(d) and 344.

The deceased who was the registered owner of a piece of land executed a deed of trust of the land in favour of his daughter. Subsequently he executed a transfer of the land to his former wife, the respondent, the mother of the child "as trustee". In the memorandum of transfer under the column "consideration" it was stated "Pemberian kapada anak mengikut surat amanah yang bertarikh 26hb Jun, 1970" (Gift to daughter in accordance with a deed of trust dated 26 June 1970). It was argued that the transfer was void as it disclosed a trust and was therefore caught by section 301(d) of the National Land Code.

Held: (1) by transferring the property to a person "as trustee", the deceased in this case had complied with the condition in paragraph (d) of section 301 of the National Land Code read together with section 344 of the Code;

(2) the entry in the memorandum of transfer was effected essentially for the purpose of showing that the gift to the child was the consideration for the transfer and the entry could not be construed to be a declaration of trust or an intention to declare a trust.

Cases referred to:-

(1) *Shephard* v. *Cartwright* [1955] A.C. 431 at p. 449.

(2) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143.

ORIGINATING SUMMONS.

K. Chelvanayagam for the applicant.

Datuk Athi Nahappan for the defendant.

Abdul Hamid J.: This is an application by Margaret Rose asking the court —

(1) To determine whether upon the true construction of the deed of trust dated 26th of June, 1970 and the memorandum of transfer dated July 1, 1970 read together or either of them is valid and of any effect in law, having regard to its execution, its terms, its attestation and its stamping;

(2) To determine whether upon the like construction of the said deed of trust it is capable or incompetent in law of founding a good and valid consideration in effecting a transfer of the land held under Q.T.(R) No. 4179 Lot 6, Town of Petaling Jaya;

(3) And upon such determination, for a declaration of the rights of the parties hereto, that is to say, the rights of the applicant as the lawful widow of Joseph De Cruz James as upon an intestacy and the legal right of the respondent as trustee;

(4) And if the determination be that the said deed of trust and/or the memorandum of transfer is incapable in law of being a good and valid deed of trust or memorandum of transfer, or, if the deed of trust is incompetent in law of founding or supporting a good and valid consideration for effecting the transfer of the said land and title to the respondent as trustee: then,

(a) For an order that the registration of transfer of the said land in favour of the respondent be declared null and void.

(b) For an order that the respondent do deliver up the issue document of title of the said land to the Senior Assistant Registrar, High Court, Kuala Lumpur, for transmission to the Deputy Registrar of Titles, Petaling Jaya, Kuala Lumpur, for rectification of the register and issue document of title and make all necessary memorials to give effect to the order of this Honourable Court.

(c) For a declaration that the current lawful registered proprietor of the said land is Joseph De Cruz James or alternatively there is a resulting trust unto him.

(d) For an order that the issue document of title to the said land be kept in the custody of the Senior Assistant Registrar, High Court, Kuala Lumpur, pending application for and grant of letters of administration to the estate of Joseph De Cruz James deceased, then unto the said administrator.

From the affidavit before the court, it is revealed that the applicant is the widow of Joseph De Cruz James the executor of the trust deed who died on October 11, 1970 (hereinafter referred to as "the deceased"). The respondent was the first wife of the deceased. The marriage between the respondent and the deceased was dissolved on ground of deceased's desertion some time at the end of 1967 and the final decree of dissolution was made on January 10, 1968.

Prior to August 13, 1970, a piece of land with premises thereon held under Q.T.(R) No. 4179 Lot 6, Petaling Jaya, in the State of Selangor (hereinafter referred to as "the said land") was registered in the name of the deceased.

On June 26, 1970, a deed of trust was executed by the deceased. On August 13, 1970, the Deputy Registrar of Titles, Petaling Jaya registered the memo-

randum of transfer and the respondent as trustee became the registered proprietor thereof.

In the recital of the deed of trust, the deceased described himself as the donor and owner of the said land and in consideration of love and affection he wanted the said land to be transferred in the name of his daughter Prem Kumari, a minor born on May 10, 1952 out of wedlock between the deceased and the respondent.

The deceased also appointed Miss Manomani Kandiah the respondent to hold the said land in trust for the benefit of the said Prem Kumari and the respondent agreed to be a trustee. In the affidavit affirmed on August 18, 1972 in support of the application the applicant said that there was a purported execution of a memorandum of transfer by the deceased purporting to transfer the said land and title to the respondent as trustee for the following consideration — *"Sabagai balasan Pemberian kapada anak mengikut surat amanah yang bertarikh 26hb Jun, 1970."**

It is the applicant's contention that the deed of trust is invalid and bad in law. It is a nullity and cannot be or support the consideration for effecting a good and valid registrable memorandum of transfer.

It is the applicant's further contention that it was a fraud upon the Registrar of Titles Selangor to cause him to effect a transfer of the said land into the name of the respondent as trustee.

The respondent's affidavit affirmed on December 6, 1972 may be summarised as follows —

The respondent maintained that the deed of trust was a valid deed made between the deceased and herself and it is wrong to say that the deed was bad in law and a nullity and cannot be or support the consideration for effecting a good and valid registrable memorandum of transfer. The respondent denied there was a fraud in connection with the transfer. She maintained that it was the deceased's intention that the child Prem Kumari should be adequately provided for even though the marriage was dissolved. For that reason the deceased executed the transfer of the said land in his lifetime as a gift to the child. A letter written by the deceased was produced. It is the respondent's contention that the applicant was fully aware of the deceased's intention.

On December 11, 1972 the applicant affirmed a supplementary affidavit stating that the respondent left for India on June 5, 1970 and only returned to Malaya some time after July 10, 1970. She also stated that the transfer of the said land was also effected by means of an insufficient and/or void instrument. Referring to the deceased's letter dated January 27, 1968 (annexed to the respondent's affidavit) the applicant said that at the time of writing the letter the deceased was a single man. She did not deny the letter was written by the deccased.

Mr. K. Chelvanayagam counsel for the applicant submitted that the applicant is relying principally on the ground that the instrument of transfer was insufficient or void and ought not to have been registered. He contended that since the transfer discloses a declaration of trust it is caught by paragraph (d) of section 301 of the National Land Code which is fatal. Section 301(d) reads —

"301. An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied — ....

(d) that it does not declare or, except as permitted by section 344, disclose the existence of any trust;"

To my mind the condition as contained in paragraph (d) has sufficiently been complied with in view of subsection (1) of section 344 of the Code the relevant portion of which reads as follows —

"344(1) Where, by any instrument of dealing ..., any alienated land ... is transferred ... in favour of any person ... 'as trustee', ... the registrar shall so describe him, ... in the memorial of registration."

The instrument I think discloses the existence of a trust and it deals essentially with the transfer of the property in favour of Manomani Kandiah as trustee. The Registrar of Titles accepted it as a fit instrument for registration and quite rightly registered it. In doing so he described her as trustee in the memorial of registration.

Mr. Chelvanayagam argued that by reason of the entry in the memorandum of transfer which reads *"Pemberian kapada anak mengikut surat amanah yang bertarikh 26hb Jun, 1970"* the instrument does in effect declare a trust and it is fatal. I do not see any merit in the argument. The entry was made under the column provided for "consideration" (other than money). It was effected essentially for the purpose of showing that a gift to the child was the consideration for the transfer. In my view the entry cannot be construed to be a declaration of trust or an intention to declare a trust.

Counsel for the applicant also submitted that in the light of Mr. Lawrence's affidavit it is apparent that the instrument was blank when Manomani signed it and as such she could not have known the contents of it. He further submitted that the National Land Code provides that the attestation clause must be strictly adhered to.

It seems clear that Manomani did not sign on July 1, 1970 and that she signed a blank form. Nonetheless it is not a disputed fact that Manomani signed "as trustee" on a form that was subsequently filled by the deceased as transferor and the deceased did indeed execute a transfer to Manomani on July 1, 1970. The practice of signing blank form has left much to be desired and to say the least it was quite irregular but I fail to see how it would render the transfer invalid. Section 211 of the National Land Code which deals with the attestation of the instruments of dealing primarily provides matters relating to persons qualified to attest, type of attestation clause to be used and the signature of the person attesting. Failure, if any, to comply with the section of the nature revealed from the circumstances of this particular case is, I think, something that affects the form and not the substance. I would regard it as a mere irregularity and not an illegality.

* Which in English means "Gift to daughter in accordance with a deel of trust dated 26th June 1970".

It is necessary for me to emphasize that there is no allegation that the deceased had not properly executed the instrument of transfer and there is absolutely nothing to show that he had not intended to execute a transfer to Manomani as trustee. The evidence on this point is, I think, overwhelming. Mr. E. J. Lawrence drew up the deed of trust at the request and instructions of the deceased and the deed was executed in his presence by both the deceased and the respondent. Clause 2 of the deed specifically provided that the donor shall soon after the execution of the trust deed execute a transfer in the name of the trustee who shall hold the property in her capacity as trustee.

I am therefore firmly of the view that mere irregularity in regard to attestation devoid of any intention on either the transferor or the transferee to deceive or perpetuate any fraud and, furthermore, considering the fact that the instrument executed had in every respect conformed with and truly set out the intention of the parties, there is indeed no ground whatever to say that the instrument is not a fit instrument for registration and is therefore void or insufficient.

As for the allegation of fraud no particulars of fraud have been set out and there is, to my mind, absolutely no evidence to support that allegation.

The applicant sought to argue that reference to "*pemberian kapada anak*" was false because it was a gift by the deceased to himself during his life and subject to his direction thereafter to the child. Whatever might have been the terminology used in the memorandum of transfer it seems clear that on proper construction of the deed of trust it is the deceased's implicit intention all along soon after the execution of the trust deed to execute a transfer in the name of the trustee who shall hold the property in her capacity as trustee.

Datuk Athi Nahappan counsel for the respondent submitted that the trust deed was created by the deceased for his daughter and he made the former wife trustee. This is clear from the deed and it could only be defeated on grounds of lack of certainties as to subject-matter, object and the words used. It is clear that the daughter is the subject of the trust, and the property, which is the object, has been clearly defined. There is also no uncertainty as to whom the property should be transferred as trustee. He also submitted that although there have been some inconsistencies in regard to the words used the deceased had made it abundantly clear that the gift was meant for the daughter and it was not unusual for the father to enjoy the property during his lifetime. Datuk Athi Nahappan further submitted that this was a voluntary gift for love and affection and it was a complete trust the moment the property was transferred to his former wife as trustee and was therefore valid and enforceable.

I see no reason to disagree with the view expressed by Datuk Athi Nahappan. As the gift came from a father to a daughter there is also, in law, a well-recognized presumption of advancement. Speaking of equitable doctrine of advancement, Viscount Simonds in *Shephard* v. *Cartwright*[1] had this to say —

"... I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in *loco parentis*, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch* v. *Finch* (1808) 15 Ves. 43."

The presumption was applied in *Palaniappa Chettiar* v. *Arunasalam Chettiar*[2] where Lord Denning speaking of transfer by father to son said —

"He had not only to get over the fact that the transfer stated that the son paid $7,000 for the land. He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard* v. *Cartwright, supra*, at p. 445. The fact that the father received the income does not suffice. see *Commissioner of Stamp Duty* v. *Byrnes* [1911] A.C. 386."

Before I conclude may I say that it is also common ground that the transfer was registered on August 13, 1970 by the Deputy Registrar of Titles, Petaling Jaya and Manomani as trustee became the registered proprietor. It would seem to me her title is not, in law, indefeasible if the applicant can show fraud or misrepresentation to which either the transferor or the transferee was a party, or, the registration was obtained by means of insufficient or void instrument. For reasons that I have stated earlier it is my finding that the applicant has neither satisfied me that there is fraud nor succeeded in showing that the instrument was not fit for registration.

In my judgment the trust deed executed by the deceased on June 26, 1970 was a valid trust and could support the consideration for effecting a good and valid registrable memorandum of transfer. It is also my judgment that the memorandum of transfer was an instrument fit for registration and the respondent having been registered as trustee her title is good in law and indefeasible.

The application is hereby dismissed with costs.

Application dismissed.

Solicitors: *Chelvanayagam & Co.; Athi Nahappan & Co.*

FOON MOON YEOW & ANOR. v. TAN SEK KEE & ORS.

[O.C.J. (Sharma J.) January 16, 1973]

[Ipoh — Civil Suit Nos. 409 & 410 of 1970]

Damages — Fatal accident — Loss of expectation of life — Adult and children — Same basis.

Loss of expectation of life is a loss in respect of expectation of life whether of adults, infants or the aged and there is no reason why it should remain at a low, arbitrary and artifical figure. Damages in respect of loss of expectation of life for both adults and children should be awarded on the same basis and no difference should be made on the computation of such damages.

In this case one adult and five children had been killed in an road accident. The learned judge awarded $3,500 for loss of expectation of life in respect of each of the six persons.